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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Two issues were presented to the District Court by cross motions for summary judgment filed by the Government and by the taxpayer: (1) whether certain Project Notes issued pursuant to the Housing Act of 1937 were exempt from federal estate taxation prior to June 19, 1984 when the taxpayer filed a claim for refund, and (2) whether §641 of the Deficit Reduction Act of 1984, which would foreclose any refund for estate taxes paid on such Project Notes, as applied retroactively to the taxpayer's refund claim, was constitutional.

The District Court devoted practically all of its opinion after stating the facts to its conclusion that §641 of the Deficit Reduction Act of 1984 if applied retroactively to the taxpayer's refund claim would be unconstitutional. The District Court also concluded that

the Project Notes were exempt from taxation.

The United States did not take direct appeal to this Court pursuant to 28 U.S.C. §1252; it appealed instead to the Court of Appeals although it sought review of the constitutional issue. The taxpayer attacked the jurisdiction of the Court of Appeals over the United States' appeal under 28 U.S.C. §§1252 and 1291. The Court of Appeals held, however, that it had jurisdiction because the District Court's conclusion that §641 of the Deficit Reduction Act of 1984 as applied to the taxpayer's refund claim was unconstitutional did "not rise to the level of an alternative holding."

The question presented is whether the District Court's order constituted the "holding of an Act of Congress unconstitutional" within the meaning of 28 U.S.C. §1252.

PARTIES TO THE PROCEEDINGS

Petitioner is William F. Netsky, as Executor of the estate of Frank W. Netsky, Deceased, and respondent is the United States.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, William F. Netsky ("taxpayer"), as Executor of the Estate of Frank W. Netsky, deceased ("decedent"), respectfully requests that a writ of certiorari be issued to review the decsion of the United States Court of Appeals

for the Third Circuit ("Court of Appeals") entered on October 12, 1988 (A1-A14).[1/]

The Court of Appeals reversed the order and judgment of the United States District Court for the Eastern District of Pennsylvania ("District Court") entered on August 8, 1986, granting the taxpayer's motion for summary judgment and denying the cross-motion of defendant the United States of America ("Government") for summary judgment, and directing the entry of judgment in favor of the taxpayer for a refund of federal estate taxes paid by the taxpayer (A14).

OPINIONS BELOW

The opinion of the Court of Appeals, filed on October 12, 1988, is not yet reported, and is reproduced in the Appendix (A1-A14). The memorandum and

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1/ References are to the pages of the Appendix hereto.

order of the District Court filed on August 8, 1986 is reported at 652 F.Supp. 783, and is reproduced in the Appendix (A19-A36).

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1). This petition is filed within the period of a stay of the mandate (until December 2, 1988) granted by the Court of Appeals on October 24, 1988.

STATUTES INVOLVED

The provisions of 28 U.S.C. §§1252, 1291 and 2101(a) are as follows:

§1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or

proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and

the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

STATEMENT OF THE CASE

The taxpayer filed a federal estate tax return on May 18, 1982, included therein the value of certain public housing agency obligations issued pursuant to the Housing Act of 1937 ("Project Notes"), and paid the estate tax due. On May 4, 1984 the taxpayer filed a petition for a refund with the Internal Revenue Service which denied the taxpayer's petition, and the taxpayer brought the instant suit in the District Court on September 9, 1985.

The taxpayer filed a motion for summary judgment upon the ground that Project Notes had been exempted from federal estate taxation by §5(e) of the Housing Act of 1937, as decided in Haffner v. United States, 757 F.2d 920 (7th Cir. 1985).

The Government opposed the taxpayer's motion and cross-moved for summary

judgment, primarily, upon the ground that by virtue of "retroactive, curative legislation", namely, the Deficit Reduction Act of 1984 ("DEFRA") which became effective on June 19, 1984, Congress had retroactively eliminated any exemption for Project Notes provided for by §5(e) of the Housing Act of 1937 and that the DEFRA applied to the taxpayer's refund claim made prior to the effective date of the DEFRA, and did not "offend considerations of due process". The Government argued, secondarily, and in the "alternative", that Haffner had been "wrongly decided" (A38-A41).

The District Court, ruling on the Government's primary contention, concluded that §641 of the DEFRA did not apply to taxpayer's refund claim and "moreover" if given such retroactive application §641 of the DEFRA would violate the Due Process clause of the Fifth Amendment

(A27). The District Court rejected the Government's secondary contention, and held, in the alternative, that Haffner v. United States had been correctly decided.

The Government appealed from the District Court's judgment to the Court of Appeals, not to this Court. The Government asserted in the Court of Appeals that the issues to be resolved were whether the Project Notes were exempt from taxation under §5(e) of the Housing Act of 1937, and whether §641 of the DEFRA if applied to the taxpayer's refund claim was constitutional (A17-A18). The taxpayer moved to dismiss the Government's appeal because of a lack of jurisdiction under 28 U.S.C. §§1252 and 1291, and the taxpayer argued that the Government should have taken a direct appeal to this Court. The Court of Appeals ordered that a decision on the taxpayer's motion to dismiss the appeal for lack of jurisdiction be

deferred to a consideration on the merits. The taxpayer moved for reconsideration of his motion attacking jurisdiction, which the Court of Appeals denied.

Because both the same statutory and constitutional issues involved in the instant case were also involved in United States v. Wells Fargo Bank, 108 S.Ct. 1179 (1988), then pending before this Court, the Court of Appeals ordered that the Government's pending appeal be held in abeyance until a decision by this Court. In Wells Fargo Bank this Court held that the Housing Act of 1937 did not exempt Project Notes from federal estate taxation. Thus, it did not reach the constitutional issue involved in a retroactive application of §641 of the DEFRA to the taxpayer's refund claim.

The instant case was submitted to the Court of Appeals, without oral argument, on July 16, 1987; it was resubmitted

on August 29, 1988 (A1).

On October 12, 1988, the Court of Appeals held that it had jurisdiction over the Government's appeal under 28 U.S.C. §§1252 and 1291 because the District Court's order did not "hold" an Act of Congress unconstitutional. The Court of Appeals held that the District Court's "due process discussion did not rise to the level of an alternative holding" (A13), and, therefore, direct review by this Court was not available under §1252. As to the merits, the Court of Appeals held that Project Notes were not exempt from federal estate taxation, relying on this Court's decision in Wells Fargo Bank, supra. The Court of Appeals reversed and remanded with directions to the District Court that judgment be entered in favor of the Government (A14).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals rejecting this Court's mandatory jurisdiction is in conflict with every decision of this Court interpreting 28 U.S.C. §1252. The District Court devoted some 90 percent of its opinion after stating the facts of the case to the constitutional issue, and one of the grounds of the District Court's decision was the unconstitutionality of §641 of the DEFRA as applied to the taxpayer's refund claim. The District Court's order was clearly "against" the constitutionality of §641 of the DEFRA. The Government appealed to the Court of Appeals for the purpose of obtaining appellate review of the District Court's decision on its constitutional contention -- the Government's primary contention in the District Court -- but appellate review of the federal constitutional issue could only be had under 28 U.S.C. §§1252 and 1291

in this Court. Further, the reliance of the Court of Appeals on United States v. Christian Echoes National Ministry is misplaced since in that case the District Court -- contrary to the instant case -- "did not question or even consider" the constitutionality of the Act of Congress involved. 404 U.S. at 563.

I. THE DECISION OF THE COURT OF APPEALS ON JURISDICTION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT INTERPRETING THE FOURTH PREREQUISITE OF 28 U.S.C. §1252

This Court noted in Heckler v. Edwards, 465 U.S. 870, 877 (1984):

> ....Section 1252 establishes four prerequisites for a direct appeal to the Supreme Court: the order appealed from must issue from an enumerated court; the United States or an agency or officer must be a party; the proceeding must be civil; and the order must hold an Act of Congress unconstitutional.... 2/

2/ Emphasis supplied to all quotations throughout.

Three of the four prerequisites to a direct appeal under 28 U.S.C. §1252 ("§1252") are concededly present herein (A8). It is the fourth prerequisite -- the "holding" requirement -- that is in dispute. Despite the fact that the District Court devoted practically all of its opinion after stating the facts to the constitutional issue relied on by the Government, the Court of Appeals held, erroneously, that the fourth prerequisite of §1252 was not present because the District Court's order did not "hold" an Act of Congress unconstitutional.

A. One Ground Of The District Court's Decision Was The Unconstitutionality of §641 Of The DEFRA As Retroactively Applied To The Taxpayer's Refund Claim

As to the issue of whether the District Court's order "held" an Act of Congress unconstitutional, the polestar is clearly United States v. Locke, 471 U.S. 84 (1985). In Locke, the Court

decided that if one ground of a district court's decision involves the unconstitutionality of an Act of Congress, a direct appeal lies to this Court, citing also this Court's 1939 decision in United States v. Rock Royal Cooperative, 307 U.S. 533 (1939). In Locke, the Court held (471 U.S. at 91 n. 8):

> That the District Court decided the case on both constitutional and statutory grounds does not affect this Court's obligation under 28 U.S.C. §1252 to take jurisdiction over the case; as long as the unconstitutionality of an Act of Congress is one of the grounds of decision below in a civil suit to which the United States is a party, appeal lies directly to this Court....

It does not make a reason given for a conclusion in a case obiter dictum merely because it is only one of two reasons for the same conclusion. Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1927). In the language of Locke, above, the District Court in the instant case also decided the case on "both

constitutional and statutory grounds", as reference to the District Court's opinion will demonstrate.

After stating the facts of the case (A19-A22), the District Court held (A22-A23) that the Project Notes were exempt from taxation. The District Court then devoted more than nine pages (A24-A33) to the issue of the constitutionality of §641 of the DEFRA as applied to the taxpayer's refund claim.

The District Court pointed out that the DEFRA was passed on July 18, 1984 and provides that it shall be effective as of June 19, 1984, making the Act, at least, partially retroactive (A25). The District Court stated that it did not accept the Government's argument that the Act should apply to refund claims before June 19, 1984, and "moreover, even if that were Congress' intent, I find that retroactive application of the statute

would be inappropriate in the circumstances of this case because it would violate the plaintiff's [taxpayer's] constitutional guarantees of due process" (A27).

More specifically, the District Court observed that in each case it is necessary for the court to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress constitutional limitations (A28). The District Court observed that three tests had been developed for determining whether a tax is so harsh and oppressive as to be a denial of due process, namely: (1) Whether the taxpayer could have altered his behavior to avoid the tax if it could have been anticipated by him at the time the transaction was effected; (2) Whether the taxpayer had notice of the tax when he engaged in the transaction; and

(3) Whether the tax is a new tax and not merely an increase in the rate of an existing tax (A28-A29).

The District Court proceeded to apply the three tests to the facts in the instant case, finding as follows: (1) At the time he purchased the Project Notes, the decedent could have altered his behavior and engaged in alternative estate planning to reduce his tax liability had he anticipated estate taxes would be levied on them (A29). (2) The decedent had no notice of the tax when he purchased the Project Notes, and the statute was not enacted or even contemplated until 1984 (A29). The District Court observed that the Government had conceded that the taxpayer had no notice, but nevertheless argued that certain treasury regulations and revenue rulings should have put decedent on notice before the time of his death of the taxability of the Project Notes (A30).

The District Court rejected the Government's argument, noting that the regulations relied upon by the Government dealt only with the general principle that income tax exemptions do not necessarily require an estate tax exclusion, and noting also that Murdock v. Ward, 178 U.S. 139 (1900) also stood only for the general proposition that an exemption from taxation does not necessarily operate as an exemption from estate taxes (A30). The District Court pointed out that the revenue ruling relied upon by the Government was not published until the first half of 1981, and by that time the decedent had already purchased the majority of the Project Notes owned by him at his death (A31). The District Court pointed out, further, that the Government had cited no case which would have put the decedent on notice that the Project Notes were subject to federal estate taxation (A31).

(3) The DEFRA amounted to a new tax since it did not fulfill a previous Congressional design: rather, it changed such design by making the Project Notes subject to estate taxes for the first time (A31-A32).

The District Court also found as a fact that "the decedent purchased each of these project notes between 1980 and 1981 with the expectation and belief that they were exempt from all taxes" (A21).

The District Court summarized its views and then held (A32-A33):

> ... Thus, after reviewing the circumstances of this case and the nature of the tax at issue I conclude that retroactive interpretation of Sec. 641(b)(2) so as to include the plaintiff's refund claim would be so harsh and oppressive it would violate the due process clause.

B. The District Court's Order Was "Against" The Constitutionality Of §641 Of The DEFRA

This Court's jurisdiction in the instant case is supported by each other

decision by this Court on the subject of the fourth prerequisite of §1252, which establishes that an order of the district court "holds" an Act of Congress unconstitutional if the order, fairly read, is "against the constitutionality" of such Act, ignoring such "semantic niceties" as the Court of Appeals relied on here, e.g. the use of the subjunctive mood and the putative distinction between a decision supported by two grounds and a decision with two "holdings". The polestar decision is, of course, Walters v. National Assn. of Radiation Survivors, 473 U.S. 305 (1985). Supporting the Court's views expressed in Walters are: Heckler v. Edwards, 465 U.S. 870 (1984); Donovan v. Richland County Ass'n, 454 U.S. 389 (1982); California v. Grace Brethern Church, 457 U.S. 393 (1982); McLucas v. DeChamplain, 421 U.S. 21 (1975); United States v. Christian Echoes National Ministry,

404 U.S. 561 (1972); Fleming v. Rhodes, 331 U.S. 100 (1947).

There is no case decided by this Court which even arguably supports the Court of Appeals' conclusion that the District Court's order was not a "holding" of statutory unconstitutionality.

In Walters, as in other cases, the issue whether the District Court's order constitutes a "holding" of statutory unconstitutionality arose in instances where the District Court did not cast its opinion formally as a ruling on statutory unconstitutionality, but merely granted a preliminary injunction against the effectiveness of an Act of Congress. In Walters and the other cases, the Court looked through form to substance, and held that even though the District Court did not explicitly hold an Act of Congress unconstitutional, the Court's appellate jurisdiction did "not turn

on such semantic niceties". Walters, supra, 473 U.S. at 317. In Walters, the Court cited Grace Brethern Church, supra, 457 U.S. at 405, where it had noted that §1252 provides jurisdiction "even though the lower court did not expressly declare a federal statute unconstitutional".

In Walters, supra, 473 U.S. at 318, the Court also observed that the word "holding" in §1252 is really a red-herring since, in its original 1937 form, §1252 referred simply to decisions "against the constitutionality" of any Act of Congress; that the change from the Act of May 24, 1937 to the codification in 1948 was effected without substantial comment, and, absent such comment, it is generally held that a change during codification is not intended to alter the statute's scope. Ibid.

The Court of Appeals here held that the District Court's decision on the

constitutional issue "did not rise to the level of an alternative holding" (A13). In addition, the Court of Appeals was impressed with the fact that the District Court in expressing its view on the unconstitutionality of §641 of the DEFRA as applied to the taxpayer's refund claim used the subjunctive mode (A11). The putative justification offered by the Court of Appeals for the Government's refusal to take a direct appeal to this Court is thus based on two quintessential semantic niceties: use of the subjunctive and the putative difference between a "holding" and a "ground of decision."

On the contrary, a fair reading of the District Court's opinion will demonstrate that its decision was indisputably "against" the constitutionality of §641 of the DEFRA. Walters, supra, 473 U.S. at 318. The District Court used the words "find" and "conclude" throughout

its opinion.

The District Court's elaborate and explicit ruling on the constitutional issue in the instant case -- which was the primary issue presented to the District Court by the Government -- constituted a "holding" of statutory unconstitutionality within the meaning of §1252, requiring a direct appeal to this Court to review the constitutional question.

II. CHRISTIAN ECHOES IS TOTALLY INAPPOSITE

In the Court of Appeals, the Government relied solely on United States v. Christian Echoes National Ministry, Inc., 404 U.S. 561 (1972) to support its contention that it was not required to take a direct appeal to this Court from the District Court's rulings. The Court of Appeals also placed heavy reliance on that case.

But, Christian Echoes, rather than supporting the Government's contention, is totally inapposite. As this Court noted in Christian Echoes, the District Court there "did not question or even consider the constitutionality" of the Act of Congress involved, 404 U.S. at 563-564. In the instant case, on the contrary, the District Court decided the constitutional issue as tendered to it by the Government, and elaborately analyzed the relevant law and facts on the issue of the application of §641 of the DEFRA to the taxpayer's refund claim. The District Court here did not merely interpret §641 of the DEFRA so as to avoid any decision of the constitutional issue as intimated by the Court of Appeals (All); but decided the constitutional issue presented adversely to the Government and "against" the constitutionality of §641 of the DEFRA.

In Christian Echoes -- unlike the instant case -- the District Court did base its interpretation of a statute on an unarticulated constitutional premise and without considering, discussing or holding the statute unconstitutional. Compare, Native American Church of Navajoland, Inc. v. Arizona Corporation Commission, 405 U.S. 901, 903 n. 3 (1972) (dissent). In the instant case, of the two grounds of the District Court's decision, one ground was a constitutional ground, holding §641 of the DEFRA unconstitutional as applied to the taxpayer. The ruling on unconstitutionality was clearly a "holding" and also was an alternative holding, thus even satisfying the Court of Appeals semantic criterion.

Even the Court of Appeals was of the view that if the District Court's ruling were characterized as a "holding" of

unconstitutionality, the fact that such holding was an "alternative" holding would still require a direct appeal to this Court (A10).

In support of its assertion that the District Court's order herein did not constitute a "holding" of statutory unconstitutionality, the Court of Appeals referred to Rosenberg v. United States, 86-2 USTC ¶13,703 (C.D. Cal. 1986), one of the cases appealed to this Court and considered in Wells Fargo Bank. The Court of Appeals erred in considering as controlling on the §1252 issue the fact that in Rosenberg the District Court, as an alternative holding, ruled that §641 of the DEFRA was intended to be retroactive and was unconstitutional, whereas in the instant case, the District Court, as an alternative holding, ruled that §641 of the DEFRA was not intended to be retroactive but if so was unconstitutional.

In Rosenberg, as in the instant case, there were several alternative holdings; in each case one of the alternative holdings determined the unconstitutionality of §641 of the DEFRA. The fact that in Rosenberg one of the alternative holdings was that §641 of the DEFRA was retroactive, and in the instant case that one of the alternative holdings was that §641 of the DEFRA was not retroactive, is merely a semantic nicety which is irrelevant to a proper interpretation of §1252.

In both Rosenberg and in the instant case, the District Court did decide the constitutional issue, as a holding. While the reason for the Government's not taking a direct appeal in the instant case, may have been based on the Government's desire to take a direct appeal in a case where the District Court had not found that the decedent purchased Project Notes "with the expectation and belief that they

were exempt from all taxes" (A21), the Government nonetheless was required to appeal to this Court from the District Court's decision herein -- no less than it was also required to appeal to this Court from the District Court's decision in Rosenberg. In both cases, the District Court decided, alternatively, against the constitutionality of an Act of Congress. The Rosenberg case, rather than supporting the Government's refusal to take a direct appeal herein, demonstrates that such refusal in the instant case violated §1252.

III. IF THE GOVERNMENT DESIRED APPELLATE REVIEW OF THE CONSTITUTIONAL ISSUE DECIDED BY THE DISTRICT COURT IT WAS OBTAINABLE ONLY IN THIS COURT ON DIRECT APPEAL

Obviously, it was necessary in ruling on the cross-motions for summary judgment, that the District Court rule on the constitutional issue -- the

primary issue presented by the Government. Neither before nor after the District Court struck down §641 of the DEFRA as unconstitutional did the Government ever concede that retroactive application of §641 of the DEFRA was unconstitutional. The Government took an appeal from that constitutional ruling of the District Court to the Court of Appeals to attack the District Court's ruling on the constitutional issue. Thus, the Government specifically represented to the Court of Appeals that the issues to be raised by the Government on appeal were: whether the Project Notes were taxable under §5(e) of the Housing Act of 1937, and if not whether the Project Notes were taxable under §641 of the DEFRA and whether that section "is constitutional" (A17-A18).

Since the Government sought review of a District Court order holding against

the constitutionality of §641 of the DEFRA, the Government was required to appeal to this Court -- not to the Court of Appeals. The latter was without jurisdiction under 28 U.S.C. §§1252 and 1291. See, Heckler, supra, 465 U.S. at 885.

Of course, had the Government sought review solely of the District Court's decision on the Haffner issue, then an appeal to the Court of Appeals would have been appropriate. But since the Government's primary contention in the District Court -- the constitutional application of §641 of the DEFRA to the taxpayer's refund claim -- was decided by the District Court against the constitutionality of that provision, a direct appeal should have been taken to this Court. Heckler, supra, 465 U.S. at 877-878, 880, 885.

The test under §1252 is whether there is a ruling by the District Court on a constitutional issue, that is,

whether the District Court's order constitutes a "holding" of unconstitutionality. The fact that there are other issues in the case which this Court naturally addresses first, is irrelevant to the §1252 issue.

In Locke, supra, 471 U.S. 84, the District Court had decided constitutional and statutory issues and this Court observed that the fact that the decision was based upon two grounds, only one of which was a constitutional ground, did not mean that this Court's mandatory jurisdiction was thereby divested, even though under basic principles the Court will turn first to non-constitutional issues. Id. at 92-93. See also, Wells Fargo Bank, supra, 108 S.Ct. 1179, where the Court held that Project Notes were not tax exempt under the Housing Act of 1937, and, therefore, did not reach the constitutional issue.

CONCLUSION

This Court observed in Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389, 391 (1982) that the Government had engaged in a "simple failure...to follow the clear commands of 28 U.S.C. §1252 and 28 U.S.C. §1291." So too, in the instant case, by appealing to the Court of Appeals instead of this Court, the Government engaged in a "simple failure" to follow the "clear commands" of Congress in 28 U.S.C. §§1252 and 1291. The time for the Government to take a direct appeal has long since passed. 28 U.S.C. §2101(a).

The Court should not leave undisturbed a decision which is patently repugnant to the principles affecting this Court's mandatory jurisdiction under §1252 which have been applied for a half-century.

The petition for certiorari to review the judgment of the Court of Appeals should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1616

WILLIAM F. NETSKY, as Executor of the
ESTATE OF FRANK W. NETSKY, Deceased

v.

UNITED STATES OF AMERICA,

Appellant

On Appeal from the United States District
Court for the Eastern District of
Pennsylvania (D.C. Civil No. 85-5219)

Submitted Under Third Circuit Rule 12(6)
July 16, 1987

Resubmitted Under Third Circuit Rule 12(6)
August 29, 1988

Before: SLOVITER, STAPLETON and
HUNTER, Circuit Judges

(Opinion filed October 12, 1988)

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Department of Justice
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OPINION OF THE COURT

SLOVITER, Circuit Judge.

The only open issue on this appeal is whether this court has jurisdiction to decide the merits of this claim regarding liability for estate taxes in excess of one million dollars which were indisputably owed to the United States. The appellee contends that this matter falls within the exclusive jurisdiction of the United States Supreme Court, to which the government did not timely appeal.

I.

Facts

William Netsky (Netsky), executor of the estate of Frank Netsky who died testate on August 18, 1981, filed a United States Estate Tax Return, Form 706, on May 18, 1982 which included in the estate $2,900,000 in public housing agency obligations (Project Notes). Netsky paid tax due out of the estate in the amount of $1,378,547.76 and subsequently paid a $38,212.96 deficiency assessed by the Internal Revenue Service on April 24, 1984.

Netsky then filed an administrative claim for a refund of $1,233,739.89 on the grounds that the Project Notes should not have been included as property of the decedent's gross estate for valuation purposes. The Internal Revenue Service denied Netsky's claim for a refund, and, after exhausting his administrative remedies, Netsky filed this action in 1985.

The district court upheld Netsky's claim, ruling that section 11(b) of the 1974 amendments to the United States Housing Act of 1937, Pub. L. No. 93-383, 88 Stat. 653, 667 (1974) (codified as amended at 42 U.S.C. §1437i(b) (1982)) expressed Congress' "clear and strong intent" to make Project Notes such as those at issue here exempt from estate tax. Netsky v. United States, 652 F.Supp. 783, 784 (E.D.Pa. 1986). In so holding, the district court also rejected the government's claim that section 641 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 939, which specifically made Project Notes estate-taxable where the decedent died, a gift was made, or a transfer was made on or after June 19, 1984, applied retroactively to Netsky. Id. at 785.

The government appealed to this court. Because the issue of the estate

tax status of Project Notes was then pending in the Supreme Court, we held the appeal in abeyance. Thereafter, in United States v. Wells Fargo Bank, 108 S.Ct. 1179 (1988), the Supreme Court squarely decided all substantive issues against the taxpayer by holding that Congress never intended to exempt Project Notes from estate taxation.

However, Netsky had filed and there remains pending a motion to dismiss the appeal in this court for lack of jurisdiction. It is Netsky's position that this court lacks jurisdiction over the government's appeal because direct review by the Supreme Court was available. We turn to that question.

II.

Jurisdiction

Under 28 U.S.C. §1291 (1982), "[t]he courts of appeals...shall have jurisdiction of appeals from all final decisions

of the district courts of the United States...except where a direct review may be had in the Supreme Court." (emphasis added).[1] Netsky claims that direct review was available by virtue of 28 U.S.C. §1252 (1982) and that therefore we have no jurisdiction. See, Heckler v. Edwards, 465 U.S. 870, 877 (1984) (Court of Appeals without jurisdiction if party has right to pursue direct appeal to Supreme Court under 28 U.S.C. §1252); Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389 (1982) (same).

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1. The text of 28 U.S.C. §1291 provides, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States...holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States... is a party."[2] Thus our disposition must depend on the availability to the government in this case of a direct appeal to the Supreme Court under section 1252.

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2. The text of 28 U.S.C. §1252 provides, in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

In order for a direct appeal to lie under section 1252, four elements must be present. See Heckler, 465 U.S. at 877. Three are clearly met: the appeal is from a court of the United States; the United States is a party; and the proceedings are civil. The parties dispute only whether the district court's order held an Act of Congress unconstitutional.

Each party in the district court had moved for summary judgment. The taxpayer pressed its claim that the Project notes were exempt from estate taxation under section 11(b) of the 1974 amendments to the Housing Act of 1937, citing Haffner v. United States, 585 F.Supp. 354 (N.D. Ill. 1984), aff'd, 757 F.2d 920 (7th Cir. 1985), which had so ruled. The government argued that section 641 of the Deficit Reduction Act of 1984, which eliminated the purported estate tax exemption effective June 19, 1984, applied retroactively

and therefore foreclosed refunds to those persons, such as this taxpayer, who had already paid the estate tax on Project Notes. The taxpayer retorted that if so construed the statute would be unconstitutional.

In its opinion finding for the taxpayer, the district court specifically based its holding that the estate was not liable for estate tax on the Project Notes on its conclusion that section 641 did not apply retroactively. The court stated that, "I do not accept the defendant's argument that the act should apply to refund claims filed before June 19, 1984. Neither the language of the statute nor its legislative history necessarily compel the conclusion that Congress intended the act be applied in a fully retroactive fashion." Netsky, 652 F.Supp. at 785.

This language rejecting the retroactive application of the statute on the

basis of its language and legislative history amply supports the government's position that the district court based its holding on statutory grounds. Had the district court said no more, there would have been no issue before us. However, the court continued, "[m]oreover, even if that were Congress' intent, I find that retroactive application of the statute would be inappropriate in the circumstances of the instant case because it would violate the plaintiff's constitutional guarantess of due process." Id. Netsky argues that the district court's ensuing discussion of the constitutionality of retroactive application of section 641 is an alternate holding. If so, direct appeal to the Supreme Court would have been proper. See United States v. Locke, 471 U.S. 84 (1985); United States v. Rock Royal Co-operative, 307 U.S. 533 (1939).

Section 1252 bases the right of direct review to the Supreme Court on the "judgment, decree or order" of a court "holding" an Act of Congress unconstitutional. In other words, it permits bypassing the intermediate appellate court because Congress intended "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress." See H. Rep. No. 212, 75th Cong., 1st Sess. 2, quoted in Fleming v. Rhodes, 331 U.S. 100, 104 n. 6 (1947). This rationale is inapplicable when the district court merely uses the possible unconstitutionality of a contrary statutory interpretation as the basis for its narrow construction of the statute.

The district court here used the subjunctive mood, indicating that the district Court's opinion was carefully structured to avoid holding that section

641 was unconstitutional. In contrast, in Rosenberg v. United States, 3 Inher. Est. & Gift Tax Rep. (CCH) ¶13,703, at 18,695 (C.D. Cal. Oct. 20, 1986), which was directly appealed to the Supreme Court as one of the cases considered in the Wells Fargo opinion, the Tax Court squarely held section 641 unconstitutional. The Rosenberg court first held that section 641 applied retroactively, and only then that it constituted an unconstitutional denial of equal protection. Rosenberg, 3 Inher. Est. & Gift Tax Rep. (CCH) at 18,697-701.

Comparing Rosenberg with the decision below, it is clear that the district court in this case narrowly interpreted the statute to avoid a constitutional issue, and did not directly hold section 641 unconstitutional. Thus, no direct appeal to the Supreme Court lay under section 1252, and jurisdiction in this

court is proper as an appeal from a final decision of a United States district court under section 1291. See United States v. Christian Echoes Nat'l Ministry, 404 U.S. 561, 565-66 (1972).

We conclude that the district court's due process discussion did not rise to the level of an alternative holding, that direct review by the Supreme Court was not available under 28 U.S.C. §1252, and that therefore we have jurisdiction over this appeal pursuant to 28 U.S.C. §1291. We will deny the motion to dismiss the appeal.

III.

The Merits

As we noted above, once we conclude that jurisdiction properly lies with this court, we must reverse the district court's holding that the Project Notes were not subject to estate tax. In United States v. Wells Fargo Bank, 107 S.Ct. 1179 (1988),

the Supreme Court held that the Housing Act of 1937 does not exempt Project Notes such as those at issue here from estate taxation. In accordance with this holding, Netsky was not entitled to a refund based on the inclusion of such notes of the decedent's estate. Therefore the district court's order granting summary judgment will be reversed and the case remanded with directions that it enter judgment for the United States.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1616

WILLIAM F. NETSKY, as Executor of the
ESTATE OF FRANK W. NETSKY, Deceased

v.

UNITED STATES OF AMERICA,

Appellant

On Appeal from the United States District
Court for the Eastern District of
Pennsylvania
(D.C. Civil No. 85-5219)

Submitted Under Third Circuit Rule 12(6)
July 16, 1987

Resubmitted Under Third Circuit Rule 12(6)
August 29, 1988

Before: SLOVITER, STAPLETON and
HUNTER, Circuit Judges

ORDER AMENDING OPINION

IT IS ORDERED that the slip opinion in the above case filed on October 12, 1988, be amended as follows:

Page 7, line 2-3 which reads: "the Tax Court squarely held section 641 unconstitutional." should read: "the district court squarely held section 641 unconstitutional." */

BY THE COURT:

/s/ Dolores K. Sloviter

Circuit Judge

Dated: November 8, 1988

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

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*/ Page A12, line 7.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL APPEAL INFORMATION STATEMENT

Please TYPE
Attach additional pages if necessary

SHORT CAPTION WITH IDENTITY OF APPELLANT

Netsky, William F. as Executor of the Estate of Frank W. Netsky, deceased

Appellee

v.

United States of America, Appellant

APPEAL FROM DISTRICT COURT

District: E.D. Pennsylvania

D. C. Docket No. (Civil) 85-5219

Date filed in D.C. 9/30/86

Date Notice of Appeal filed: 10/2/86

* * * * *

ISSUES TO BE RAISED ON APPEAL:

1. Whether obligations of public housing agencies owned by decedent at the time of his death were includible in decedent's gross estate or were excluded by virtue of the United States Housing Act of 1937, as amended.

2. Whether, if such obligations were not otherwise includible, they were includible by virtue of the provisions of Section 641 of the Deficit Reduction Act of 1984.

3. Whether, if Section 641 of the Deficit Reduction Act of 1984 is construed to provide an affirmative answer to 2, supra, it is unconstitutional.

* * * * *

/s/ ROGER M. OLSEN

(Signature of Counsel)
ROGER M. OLSEN
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. NETSKY, as Executor of the Estate of FRANK W. NETSKY, deceased	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 85-5219

MEMORANDUM AND ORDER

KELLY, J. AUGUST 8, 1986

This is an action against the government filed by the executor of the estate of Frank W. Netsky ("decedent") asserting a claim for a refund of $1,233,739.89 in estate taxes, plus costs and interest. Jurisdiction is predicated on 28 U.S.C. §1346(a)(1). The parties have filed cross motions for summary judgment based on the undisputed facts in the record. For the reasons stated in this Memorandum, the executor's motion is granted and the government's motion is denied.

The decedent, a citizen of Montgomery County, died testate on August 18, 1981.

The plaintiff was appointed as executor of the estate. In discharging his responsibilities, on May 18, 1982 the plaintiff timely filed a United States Estate Tax Return, Form 706, and paid the tax shown as due in the amount of $1,378,547.76.[1]

The following public housing agency obligations ("project notes") were included in the decedent's estate as part of Schedule B of the 706 return:

(1) $200,000.00 Fayette County, PA Project Notes, 7.32%, due 12/4/81 with interest accrued from 6/30/81 to 8/18/81

(2) $1,000,000.00 Philadelphia, PA Project Notes 5th Series 1980, 6.04%, due 10/21/81 with interest accrued from 10/7/80 to 8/18/81

(3) $500,000.00 Philadelphia Housing Authority Project Notes, 6.32%, due 10/2/81 with interest

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1. On April 24, 1984, the Internal Revenue Service ("IRS") asserted a deficiency of $38,212.96. The plaintiff waived restrictions on assessment and collection, and shortly thereafter paid the tax deficiency.

accrued from 10/7/80 to 8/18/81

(4) $200,000.00 Pittsburgh, PA Project Notes, 8.21%, due 12/4/81 with interest accrued from 6/2/81 to 8/18/81

(5) $1,000,000.00 Williamsport, PA Project Notes, 7.54% due 12/4/81 with interest accrued from 8/4/81 to 8/18/81

The decedent purchased each of these project notes between 1980 and 1981 with the expectation and belief that they were exempt from all taxes.

On May 7, 1984 the plaintiff filed an administrative claim for a refund, asserting that the project notes should not have been included as part of the property in valuing the decedent's gross estate. The plaintiff claimed the project notes are exempt from estate taxation pursuant to Section 11(b) of the United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937) ("Section 11(b))" and Section 102(g) of the Housing Act of 1949. The IRS did not act favorably on the

plaintiff's claim in the six month period following its filing. Having exhausted his administrative remedies, the plaintiff filed this suit on September 9, 1985. The defendant claims first, that the notes are not exempt from estate tax under Section 11(b) and second, that retroactive, curative legislation has clarified that the Section 11(b) tax exemption does not apply to the federal estate tax. The questions presented by the cross motions for summary judgment are solely of law.

The Project Notes Were Exempt From Estate Tax

Section 11(b) provides that obligations like the project notes owned by the decedent and the interest on them "shall be exempt from all taxation now or hereafter imposed by the United States whether paid by such agencies or by the United States." While statutory language granting an exemption from "taxation" and "all taxation" does not necessarily operate

as an exemption from estate taxes, see, e.g., Murdock v. Ward, 178 U.S. 139 (1900); U.S. Trust Co. v. Helvering, 307 U.S. 57 (1939), where there is a "strong indication" in a statute and its legislative history that Congress intended an exemption to encompass estate taxes, specific congressional intent overrides the general rule. See Greene v. United States, 171 F. Supp. 459 (Ct. Cl. 1959), cert. denied, 360 U.S. 933 (1959).

Congress, through the language of Section 11(b) and the Act's legislative history, manifested its clear and strong intent to exempt project notes from estate taxes. The District Court of the Northern District of Illinois determined that project notes are exempt from federal estate taxes under Section 11(b). Haffner v. United States, 585 F.Supp. 354 (N.D. Ill. 1984), aff'd 757 F.2d 920 (7th Cir. 1985).

The court presented a detailed and well reasoned opinion to support this conclusion, and delineated several independent sources which illustrate the congressional intent to exempt the project notes from estate taxes. 585 F. Supp. at 357-361. I am persuaded that the reasoning and conclusion in that case is correct, and I choose to adopt it in the instant matter. The defendant submits that Haffner constitutes bad law, and urges the court to adopt the reasoning presented in the dissenting opinion of Judge Posner, 757 F.2d at 921. To do so would entail ignoring the act's legislative history.

Section 641 of the Deficit Reduction Act of 1984 Does Not Affect the Result of this Case

On July 18, 1984 Congress passed Section 641 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 ("Sec. 641"), which makes project notes

taxable. According to subsection (b)(1), the law applies to estates in which the decedent died, a gift was made, or a transfer was made on or after June 19, 1984. The decedent in this matter died August 18, 1981; and the claim for a refund was filed May 7, 1984. Thus, subsection (b)(1) does not make Sec. 641(a) applicable to this case.

However, the government argues Sec. 641(a) applies by virtue of subsection (b)(2), because, the government claims, it makes the "substantive clarifying provisions" of subsection 641(a) applicable to certain types of transactions rather than transactions ocurring on or before a particular date. Subsection (b)(2) states:

> (b) Effective Date
>
> (2) Treatment of certain transfers treated as taxable. -- The provisions of subsection (a) shall also apply in the case of any transfer of property (or interest therein) if at any

> time there was filed an estate or gift tax return showing such transfer as subject to Federal estate or gift tax.

It is undisputed that, prior to the plaintiff seeking a refund, he reported the project notes on the decedent'sestate tax return.[2] However, the plaintiff argues Sec. 641 is not made applicable by subsection (b)(2), or by any other subsection, because Sec. 641 is not retroactive in application. The plaintiff also claims that retroactive application would violate the due process clause and would deny the plaintiff equal protection of the law.

The Deficit Reduction Act was passed on July 18, 1984. Subsection (b)(1)

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2. The plaintiff emphasizes that the executor reported the notes because as a fiduciary he was required to adopt a conservative tax position. By reporting the project notes on the return, the executor prudently avoided interest payment exposure, and, instead, permitted the statutory rate to run in favor of the estate on the overpayment.

details an effective date of June 19, 1984. Thus, the act is at least partially retroactive because Congress' intent that the bill apply retroactively for a thirty day period prior to its passage is explicitly stated. However, I do not accept the defendant's argument that the act should apply to refund claims filed before June 19, 1984. Neither the language of the statute nor its legislative history necessarily compel the conclusion that Congress intended the act be applied in a fully retroactive fashion. Moreover, even if that were Congress' intent, I find that retroactive application of the statute would be inappropriate in the circumstances of the instant case because it would violate the plaintiff's constitutional guarantees of due process.

The Third Circuit in Temple University v. United States, 769 F.2d 126, 135 (1985), in considering the retroactivity

of FICA tax provisions, quoted Welch v. Henry, 305 U.S. 134, 147 (1938) for a conceptual framework for constitutional retroactivity analysis: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress constitutional limitation." Both parties referred to the analytical framework summarized in United States v. Darusmont, 449 U.S. 292 (1981), which states that three tests have been developed for determining whether a tax is so harsh and oppressive as to be a denial of due process: Whether the taxpayer could have altered his behavior to avoid the tax if it could have been anticipated by him at the time transaction was effected; whether the taxpayer had notice of the tax when he engaged in the transaction; and whether

the tax is a new tax, not merely an increase in the rate of an existing tax. In applying Temple's conceptual framework and Darusmont's analytical framework to this case I conclude that a retroactive application of Sec. 641(b)(2) encompassing refund claims filed before June 19, 1984 would be so harsh and oppressive as to be denial of due process.

First, I note that at the time he purchased the project notes the decedent could have altered his behavior and engaged in alternative estate planning to reduce his tax liability had he anticipated estate taxes would be levied on them. For example, he could have made gift transfers, or he could have chosen investments with higher yields.

Second, I find that the decedent had no notice of the tax when he purchased the project notes. The statute was not enacted or ever contemplated until 1984.

In answering interrogatories, the government conceded the taxpayer had no notice.[3] The government now argues certain treasury regulations and revenue rulings had put the decedent on notice before the time of his death. I disagree. Treasury Regulation §20.2033 deals only with a general principle that income tax exemptions do not necessarily require an estate tax exclusion. Murdock v. Ward, 178 U.S. 139 (1900) was also cited by the government, but it too stands only for the general proposition that an exemption from taxation does not necessarily operate as an exemption from estate taxes. Revenue

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3. Interrogatory No. 11: Do you contend that the decedent had notice before the date of his death of the possibility of the enactment or the enactment of Section 641 of the Tax Reform Act of 1984?

Response: No.

Ruling 81-63 was not published until the first half of 1981. By that time, the decedent, who had purchased project notes beginning in October of 1980, had already completed his estate plan and had purchased the majority of the project notes at issue. The government has cited no case which would have put the decedent on notice by holding that project notes were subject to estate taxation.

Third, I find that Section 641 amounts to a new tax. The government has vigorously argued that Section 641 is "clarifying, curative legislation," and therefore is not subject to strict construction favoring prospective application. Section 641 is titled "Clarification of Treatment of Certain Exemptions for Purposes of the Federal Estate and Gift Taxes." However, the fact is that Sec. 641 did not fulfill a previous Congressional design: rather, it changed the

design by making the project notes subject to estate taxes for the first time. Before the enactment of Section 641, project notes were exempt from estate taxes. See Haffner v. United States, 757 F.2d 920 (7th Cir. 1985).

In conclusion, the application of Section 641 to the facts of this case would violate the due process clause. The decedent died almost four years prior to the change in the law, and the decedent did not believe the project notes were subject to estate tax. Internal Revenue Service circulars and a Public Housing Authority memorandum indicated that project notes were not subject to estate tax. No case law or revenue ruling articulated the contrary position, until the publication of Rev. Ruling 81-63 in the year the decedent died. The enactment of Section 641 made project notes subject to estate taxes for the first time. Thus,

after reviewing the circumstances of this case and the nature of the tax at issue I conclude that retroactive interpretation of Sec. 641(b)(2) so as to include the plaintiff's refund claim would be so harsh and oppressive it would violate the due process clause.

Following the hearing, at the court's request, the plaintiff submitted a computation of the refund alleged to be due in this matter. This computation was submitted by cover letter of June 11, 1986. To date, the government has not contested the computation, despite having averred at the hearing that there was a mathematical error in the plaintiff's calculations. For the purposes of the motions presently before it, the court will accept the plaintiff's computation, as attached to this memorandum.

The plaintiff alleges he is entitled to an award of attorney's fees as a

prevailing party in this matter, pursuant to 26 U.S.C. §7430. I do not agree, as I do not find that the defendant's position in this matter was unreasonable.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. NETSKY, as Executor of the Estate of FRANK W. NETSKY, deceased	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 85-5219

O R D E R

AND NOW, this 8th day of August, 1986, for the reasons set forth in the foregoing Memorandum, and after a hearing before the court, it is ORDERED that plaintiff's motion for summary judgment is GRANTED and defendant's motion for summary judgment is DENIED and that summary judgment shall be entered in favor of the plaintiff and against defendant United States of America in the amount of One million two hundred thirty nine dollars and eighty nine cents ($1,233,739.89), plus statutory interest thereon.

BY THE COURT:

/s/ James M. Kelly

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. NETSKY, as Executor of the Estate of FRANK W. NETSKY, deceased	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 85-5219

CIVIL JUDGMENT

Before THE HONORABLE JAMES McGIRR KELLY, J.

AND NOW, this 8th day of August 8, 1986,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of plaintiff in the amount of $1,233,739.89, plus statutory interest thereon and against defendant United States of America.

BY THE COURT:

ATTEST:

Deputy Clerk
ARLENE L. QUINN

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. NETSKY, Plaintiff,	)	
v.	)	CIVIL ACTION
UNITED STATES, Defendant.	)	NO. 85-5219

ANSWER TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW DEFENDANT, the United States of America, by and through its attorneys, and in accordance with Local Rule 20(c), hereby answers plaintiff's motion for summary judgment filed in the captioned action. Defendant United States opposes the motion for summary judgment on the grounds that:

1. By means of retroactive, curative legislation, Congress has clarified the inapplicability of the tax exemption contained in the Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888, Sec. 11(b), as amended by the Housing &

& Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, Sec. 201(a), to the federal estate tax. By that legislation, Congress made it clear that various federal statutes exempting property from federal taxation do not exempt such property in respect of transfer taxes, such as the estate tax. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, Sec. 641(a).

2. Furthermore, Sec. 641(a) is retroactive in nature, so as to apply to all transfers which have at any time been reported as subject to a federal transfer tax. Deficit Reduction Act of 1984, supra, Sec. 641(b)(2). Since the transfers of public housing agency bonds at issue in this suit were reported as subject to the federal estate tax on the estate tax return filed by plaintiff, such property is clearly within the retroactivity provisions of Sec. 641. Moreover, retroactive

application of Sec. 641 will not, as argued by plaintiff, offend considerations of due process, neither will such application deny to plaintiff the equal protection of the laws. See Temple University v. United States, 769 F.2d 126 (3d Cir. 1985).

3. Alternatively, should the Court disagree with the foregoing, defendant submits that the case upon which plaintiff relies for his theory of recovery, Haffner v. United States, 757 F.2d 920 (7th Cir. 1985) (per curiam), was wrongly decided. See Haffner v. United States, supra at 921-923 (dissenting opinion of Judge Posner). In addition to the criticisms set forth in Judge Posner's dissent, defendant submits that the Seventh Circuit, in deciding Haffner as it did, disregarded fundamental legal principles favoring the liberal interpretation of applicable Treasury regulations. In its disregard, the

Seventh Circuit implicitly invalidated a pertinent Treasury regulation.

4. Finally, and regardless of the foregoing, plaintiff has made a substantial mathematical error in calculating his refund of taxes alleged to be due under the theory of recovery advanced in the motion for summary judgment.

For the foregoing reasons, plaintiff's motion for summary judgment should be denied.

The grounds set forth above are more fully explained and discussed in a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment & In Support of Defendant's Cross-Motion for Summary Judgment which is served and filed herewith.

DATE: April 17, 1986.

Respectfully submitted,

EDWARD S.G. DENNIS, JR.
United States Attorney

/s/ Michael J. Salem

MICHAEL J. SALEM
Trial Attorney-Tax Division
U.S. Department of Justice
P. O. Box 227
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Telephone: (202) 724-6483

Supreme Court, U.S.
FILED
JAN 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-921

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-921

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals lacked jurisdiction over the government's appeal on the ground that appeal lay exclusively to this Court under 28 U.S.C. 1252.

1. The underlying substantive issue in this case is the same as that decided by this Court in *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), namely, whether certain "Project Notes" issued by local housing authorities were exempt from the federal estate tax under the United States Housing Act of 1937, ch. 896, 50 Stat. 888. The pertinent facts are as follows: Frank W. Netsky died on August 18, 1981, owning Project Notes in the aggregate face amount of $2,900,000. On May 18, 1982, petitioner filed a federal estate tax return for the decedent's estate, and that return included in the gross estate the Project Notes and interest accrued thereon to

the date of death. Petitioner paid the tax of $1,378,548 shown as due on the return. Pet. App. A19-A21.

In 1984, however, a federal district court held that such Project Notes were exempt from the federal estate tax. *Haffner* v. *United States*, 585 F. Supp. 354 (N.D. Ill.), aff'd, 757 F.2d 920 (7th Cir. 1985). Shortly thereafter, petitioner, invoking the *Haffner* decision, filed a claim for refund of a large part of the federal estate taxes previously paid, asserting that the Project Notes should not have been included in the decedent's gross estate. When the Internal Revenue Service did not act favorably upon the claim within six months, petitioner instituted this suit for refund in the United States District Court for the Eastern District of Pennsylvania.

In the interim, on July 18, 1984, the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, was signed into law. Section 641 of that Act responded to the *Haffner* decision. Subsection (a) provided that nothing in any provision of law exempting any property from taxation should exempt the transfer of such property from federal estate, gift, and generation-skipping taxes. Subsection (b)(1) made the provisions of subsection (a) applicable to the estates of decedents dying, gifts made, and transfers made on or after June 19, 1984. Subsection (b)(2) provided that the provisions of subsection (a) should also apply in the case of any transfer of property "if at any time there was filed an estate or gift tax return showing such transfers as subject to Federal estate or gift tax." See *United States* v. *Wells Fargo Bank*, slip op. 2.

2. The district court considered the case on the basis of cross-motions for summary judgment. The government put forth two defenses to the refund suit. First, it argued that *Haffner* was wrongly decided and that Project Notes had never been exempt from the federal estate tax. Second, it argued that, in any event, Section 641(a) and (b)(2)

of DEFRA applied because petitioner had reported the Project Notes as taxable on the estate tax return, and therefore petitioner could not invoke the Housing Act of 1937 to claim that the Project Notes were exempt from the estate tax. In response, petitioner argued that *Haffner* was correctly decided, and that DEFRA did not prevent the court from following *Haffner*. The latter argument had two separate components. First, petitioner argued that Section 641 should not be construed to apply retroactively, at least not to refund claims filed before its enactment (C.A. App. 69-77). Specifically, petitioner argued that the statutory language did not clearly extend Section 641(a) to claims filed before its effective date. Petitioner further argued that "interpretations which avoid constitutional difficulties are preferred," and stated that his suggested construction that DEFRA does not apply in this case "avoids constitutional infirmities which otherwise would require the invalidation of the statute" (C.A. App. 77). Second, petitioner argued that, if the court "were to construe Section 641 to be of retroactive effect before June 19, 1984," then "[s]uch retroactive application * * * would violate the due process and equal protection clauses of the Fifth Amendment" (*ibid.*; see *id.* at 77-84).

The district court accepted petitioner's arguments (Pet. App. A19-A34). The court approved and adopted the *Haffner* decision (Pet. App. A24), and it then turned to a consideration of Section 641 of DEFRA. The court clearly stated that it agreed with petitioner that, as a matter of statutory construction, DEFRA did not apply to the refund claim in this case (Pet. App. A24-A27). The court stated (*id.* at A27): "I do not accept the [government's] argument that the act should apply to refund claims filed before June 19, 1984. Neither the language of the statute nor its legislative history necessarily compel the conclusion

that Congress intended the act to be applied in a fully retroactive fashion." The court then added (*ibid.*): "Moreover, even if that were Congress' intent, I find that retroactive application of the statute would be inappropriate in the circumstances of the instant case because it would violate the plaintiff's constitutional guarantees of due process." The court then proceeded to explain in detail (*id.* at A27-A32) why it believed that retroactive application of Section 641 "would violate the due process clause" (Pet. App. A32, A33).

3. The government appealed to the court of appeals under 28 U.S.C. 1291. Petitioner filed a motion to dismiss the appeal for lack of jurisdiction, asserting that the District Court had held a federal statute to be unconstitutional and therefore 28 U.S.C. 1252 and 1291 permitted an appeal only to this Court. After this Court entered its decision in *Wells Fargo Bank*, the court of appeals denied the motion to dismiss and reversed the judgment below (Pet. App. A1-A14). The court of appeals held that the district court's "language rejecting the retroactive application of [Section 641] on the basis of its language and legislative history amply supports the government's position that the district court based its holding on statutory grounds" (Pet. App. A9-A10). With respect to the district court's additional discussion supporting its conclusion that retroactive application "would be" unconstitutional, the court of appeals stated that "[t]he district court here used the subjunctive mood, indicating that the district Court's opinion was carefully structured to avoid holding that section 641 was unconstitutional" (*id.* at A11-A12). On the merits, the court stated that this Court's decision in *Wells Fargo Bank* required reversal of the judgment of the district court (Pet. App. A13-A14).

4. Petitioner, having successfully argued to the district court that Section 641 of DEFRA should be construed not

to apply retroactively to the refund claim in this case, now argues that the district court's decision was one holding a federal statute unconstitutional, and therefore that the court of appeals lacked jurisdiction to entertain an appeal from its judgment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question presented is of no continuing significance because the statute providing for direct appeal to this Court when a federal statute has been held unconstitutional, 28 U.S.C. 1252, was repealed by Pub. L. No. 100-352, 102 Stat. 662, effective with respect to judgments entered on or after September 25, 1988. Accordingly, review by this Court is not warranted.

The district court in this case plainly held, as petitioner argued that it should, that Section 641 should not be construed retroactively to apply to the refund claim in this case. The court supported that conclusion by reference to the statute's language and legislative history. The court also stated that retroactive application of the statute would be unconstitutional, which supported its statutory construction because of the principle that statutes should be construed, if possible, to avoid constitutional problems—a statutory construction argument that petitioner pressed upon the district court (see C.A. App. 77). As the court of appeals held, direct appeal to this Court under Section 1252 cannot be invoked where, as here, "the district court merely uses the possible unconstitutionality of a contrary statutory interpretation as the basis for its narrow construction of the statute" (Pet. App. A11).

The correctness of the court of appeals' conclusion is clearly demonstrated by this Court's decision in *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561 (1972), where the district court overturned the

IRS's decision to revoke the Ministry's status as a tax-exempt religious organization because of its political activities. The district court found that all of the organization's activities were in furtherance of its religious beliefs, and it narrowly construed 26 U.S.C. 501(c)(3) as not proscribing those activities. The district court found that this construction of the statute was necessary to preserve its constitutionality, discussing in some detail the reasons why, in its view, interpreting Section 501(c)(3) to justify revocation of the organization's tax exemption would render the statute unconstitutional. See 28 A.F.T.R.2d (P-H) ¶ 71-5260, at 71-5945 (N.D. Okla. 1971). This Court held that the district court's decision was not directly appealable under Section 1252, and instead that appeal properly lay to the court of appeals. The Court explained (404 U.S. at 565-566): "Although the [statutory] construction was based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional, as contemplated by § 1252. To the contrary, the District Court construed the section so as to save its constitutionality." Similarly here, the district court's holding rested on a construction of the statute that it viewed as avoiding constitutional difficulties, and the court of appeals correctly held that the decision was not directly appealable to this Court under 28 U.S.C. 1252.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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NO. 88-921

In The

Supreme Court of the United States

October Term, 1987

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Memorandum for the United States In Opposition filed herein on January 10, 1989 ignores every one of the nine decisions of this Court on §1252 cited in the taxpayer's petition, except that the Government's sole and entire opposition to the taxpayer's petition is predicated upon an erroneous

interpretation of United States v. Christian Echoes National Ministry, 404 U.S. 561 (1972), as applied to a distorted statement of the District Court's decision and order herein.

1. The controlling principle applicable to a determination herein, as to whether the District Court's decision amounts to the "holding" of a provision of an Act of Congress unconstitutional within the meaning of §1252, is to be found in United States v. Locke, 471 U.S. 84 (1985), and here the district court's holding of unconstitutionality of §641 of the Deficit Reduction Act of 1984 ("DEFRA") is indisputably one of several grounds of the District Court's decision.

This Court's decisions other than Locke and Christian Echoes on §1252 cited in the petition, viz., Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985); Heckler

v. Edwards, 465 U.S. 870 (1984); Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982); California v. Grace Brethern Church, 457 U.S. 393 (1982); McLucas v. DeChamplain, 421 U.S. 21 (1975); United States v. Christian Echoes National Ministry, 404 U.S. 561 (1972); and Fleming v. Rhodes, 331 U.S. 100 (1947) establish the guide-lines for determining the presence of the four elements of §1252. They collectively establish the rejection of any approach thereto based on mere "semantic niceties", which was the erroneous approach used by the Court of Appeals herein. The Government's Memorandum does not discuss a single one of these cases except for Christian Echoes, and the absence of such discussion speaks volumes.

2. Nor is the Government's attempt to draw a parallel between the

instant case and Christian Echoes valid in any way. The Government argues that "[s]imilarly here, the district court's holding rested on a construction of the statute that it viewed as avoiding constitutional difficulties"[1/] (Gov. Memo. at 6), and implies (despite the fact that the District Court devoted 90 percent of its opinion to declaring §641 of the DEFRA unconstitutional as retroactively applied to the taxpayer's refund claim) that the District Court herein did nothing more than hold that Congress did not intend that §641 of the DEFRA should be retroactively applied. However, the District Court herein did not interpret the Act of Congress in question to "avoid" any constitutional difficulty. The District Court herein decided the

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1/ Emphasis supplied to all quotations unless otherwise noted.

constitutional issue framed by the Government, and decided the issue adversely to the Government.

Further, the Government distorts Christian Echoes, because this Court's opinion clearly states that whatever constitutional issue existed resulted simply from the interpretation given to §501(c)(3) of the 1954 Internal Revenue Code by the Internal Revenue Service -- an administrative agency -- and the Service's manner of enforcement, and that the district court in Christian Echoes did not consider the constitutionality of the Act there in question. The Court said:

> The "basis" of the District Court's decision, United States v. Raines, 362 U.S. 17, 20, 80 S.Ct. 519, 522, 4 L.Ed. 2d 524, was that under the facts adduced at trial, the appellee qualified for exempt status under §501(c)(3). The court did not question or even consider the constitutionality of §501(c)(3) "as a whole".

> Nor does any part of its opinion hold that the section was unconstitutional "as applied". Indeed, the court in this case could hardly have found the appellee to be qualified for an exemption under §501(c)(3), only to hold that the section could not be validly applied in the first place.

404 U.S. at 463-464.

While, as this Court noted in the above quotation from Christian Echoes, this Court said that the district court therein did not consider the constitutional issue and construed the Act to avoid deciding the constitutional issue, in the instant case -- on the contrary -- the District Court held, in part, that §641 of the DEFRA, retroactively applied, was unconstitutional, and the District Court devoted almost all of its opinion to the reasons why it had found and decided the unconstitutionality of the Act.

As to any claim that the District Court's constitutional decision herein might be obiter dicta, not only is such a claim based on a "semantic nicety", but the Government ignores the stated basis of the Court of Appeals' decision, namely, that "the district court's due process discussion did not rise to the level of an alternative holding" (A13). And the Court of Appeals itself said:

> Netsky argues that the district court's ensuing discussion of the constitutionality of retroactive application of section 641 is an alternative holding. If so, direct appeal to the Supreme Court would have been proper. See, United States v. Locke, 471 U.S. 84 (1985); United States v. Rock Royal Cooperative, 307 U.S. 533 (1939).

The Court of Appeals further observed with respect to the District Court's rejection of a retroactive application of §641 of the DEFRA, that "[h]ad the district court said no more, there would have been no issue before

us" (A10). But the actual fact is that the District Court said "more" -- much more -- and it decided the very constitutional issue framed by the Government, on which issue the Government relied in its motion for summary judgment and in its opposition to the taxpayer's similar motion.

In a quite similar circumstance, in Equal Employment Opportunity Commission v. Allstate Insurance Company, 467 U.S. 1232, 1235-36 (1984), the dissent stated with respect to the similar argument made by the Solicitor General, namely, that the district court's invalidation of the Act therein involved "probably could have been -- and perhaps should have been -- on a statutory, not a constitutional, basis" as follows:

> But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and

> implicitly, by the Court, that the holding was in reality one of statutory construction, cannot change the fact that the District Court explicitly and unambiguously held the entire Act unconstitutional [emphasis to the word "unconstitutional" in the original].

In the instant case, the District Court held that -- retroactively applied -- §641 of the DEFRA was unconstitutional; the District Court held, in addition, that the provision was not intended to be retroactive.

Finally, with regard to the repeal of §1252 by Pub. L. No. 100-352, that law specifically states that the changes provided therein shall not affect any judgments or orders subject to appeal that were issued prior to the Act's effective date on September 25, 1988. The District Court's order herein was entered on August 8, 1986 -- more than two years prior to the repeal of §1252.

Further, the question presented by the instant petition will continue to have the same frequently recurrent significance to this Court's jurisdiction as it had prior to the repeal of §1252.[2/]

2/ Since, both before as well as after September 25, 1988, §1254(1) allowed, and hereafter will allow, any party to docket an appeal in the court of appeals and then immediately file a petition for certiorari before the rendition of the court of appeals decree, §1252 "should long ago have been recognized as largely superfluous in view of the expedited certiorari process embodied in §1254(1)." B. Boskey and E. Gressman, **The Supreme Court Bids Farewell To Mandatory Appeals**, 109 S.Ct. ixxxi, xcv (1988). The only difference as to district court judgments entered after September 25, 1988, with regard to whether such judgments "hold" an Act of Congress unconstitutional, will be that such determinations will be made in light of the discretionary and not the mandatory jurisdiction of the Court.

In conclusion, the Government has ignored all of the controlling precedents of this Court on §1252 and has presented in its Memorandum nothing of substance in opposition to the petition except its sole argument based upon an erroneous version of Christian Echoes and a distorted analysis of what the District Court decided herein.

As a consequence, the petitioner requests that the Court grant the petition for certiorari and summarily reverse the order of the Court of Appeals, upon the ground that the Court of Appeals from the beginning lacked jurisdiction over the Government's

appeal to it under §1252.

Respectfully submitted,

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